IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1996 SESSION

FILED

February 20, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**No. 01C01-9603-CR-00113**
Appellee,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**Hon. Thomas H. Shriver, Judge**
RICHARD RICARDO KING,	)	
	)	(Sentencing - Sale of Cocaine)
Appellant.	)	

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY
JUDGE

OPINION

Richard Ricardo King appeals the sentences imposed by the Criminal Court of Davidson County following his guilty plea to one (1) count of the sale of cocaine over .5 grams and three (3) counts of the sale of cocaine in an amount over 26 grams. The appellant was sentenced to ten (10) years confinement on each count to be served concurrently. The appellant claims that his sentences are excessive as a Range I, Standard Offender in light of certain mitigating factors not considered by the trial court. T.C.A. § 40-35-113. Further, he claims that one of the enhancement factors considered by the trial court was not allowed by the statute, thereby rendering the ten-year sentences unreasonable. T.C.A. § 40-35-114(8). Because we find the sentences are appropriate, the judgment of the trial court is affirmed.

I

The appellant and a co-defendant were indicted in 1994 for one (1) count of the sale of cocaine over .5 grams, four (4) counts of the sale of cocaine in an amount over 26 grams and one (1) count of possession of a deadly weapon with the intent to employ it in the commission of or escape from an offense. Later that year the grand jury returned additional indictments against the appellant for one (1) count of possession with the intent to sell .5 grams or more of cocaine and one (1) count of possession with the intent to sell a Schedule IV controlled substance. The appellant entered a plea of guilty to one (1) count of the sale of cocaine over .5 grams and three (3) counts of the sale of cocaine over the amount of 26 grams. The remaining counts were dismissed.

At the sentencing hearing, the district attorney general argued the applicability of the following enhancement factors: (1) the appellant was the leader in the commission of an offense involving two or more actors; (2) the appellant had a prior misdemeanor conviction of the unlawful possession of a firearm; and (3) the appellant had a previous unwillingness to comply with the conditions of a sentence involving release in the community. The appellant argued the applicability of the

following mitigating factors: (1) the criminal conduct neither caused nor threatened serious bodily injury; and (2) because of his youth, he lacked substantial judgment in committing the offenses.

The trial court found that there were two enhancement factors present. The court agreed that the appellant was the leader in the commission of offenses involving two or more actors. Additionally, the court stated that the appellant had shown an unwillingness to comply with the conditions of release in the community by failing to appear in court on at least three (3) occasions on the subject charges and by committing these offenses while on misdemeanor probation. The court further found that no mitigating factors were present, thereby discrediting those factors offered by the appellant. Specifically, the trial judge found that these sales of cocaine were threats to serious bodily injury. The trial judge also found the appellant's age of 24 was not the cause of his lack of judgment. The trial judge then sentenced the appellant to ten (10) years for each offense to be served concurrently.

On appeal, the appellant argues that the trial court misapplied the enhancement factor that the appellant has shown an unwillingness to comply with the conditions of release in the community, specifically T.C.A. § 40-35-114(8). Furthermore, the appellant claims that the trial court neglected to consider that he had no prior felony convictions and that he expressed remorse for his conduct at the sentencing hearing, both of which should have been mitigating factors under T.C.A. § 40-35-113(13). Therefore, the appellant contends that his sentences are excessive and should be reduced.

II

This Court's review of the sentence imposed by the trial court is *de novo* review with a presumption of correctness. T.C.A. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is upon the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d)

Sentencing Commission Comments. In conducting our review, we are required, pursuant to T.C.A. § 40-35-210, to consider the following factors in sentencing:

> (1) [t]he evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

If no mitigating or enhancing factors for sentencing are present, T.C.A. § 40-35-210(c) requires a minimum sentence within the applicable range as the presumptive sentence. *See* State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991). However, if such factors do exist, a trial court should start at the minimum sentence, enhance the minimum sentence within the range for aggravating factors and then reduce the sentence within the range for the mitigating factors. T.C.A. § 40-35-210(e). No particular weight for each factor is prescribed by the statute, as the weight given to each factor is left to the discretion of the trial court as long as its findings are supported by the record. State v. Moss, 727 S.W.2d 229 (Tenn. 1986); State v. Santiago, 914 S.W.2d 116 (Tenn. Crim. App. 1995); *see* T.C.A. § 40-35-102 Sentencing Commission Comments. Nevertheless, should there be no mitigating factors, but enhancement factors are present, a trial court may set the sentence above the minimum within the range. T.C.A. § 40-35-210(d); *see* State v. Manning, 883 S.W.2d 635 (Tenn. Crim. App. 1994).

III

The appellant contends that failing to appear in court on the subject charges is not a previous history of unwillingness to comply with "conditions of a sentence" involving release in the community. We agree. Pre-trial bail is not a "sentence." Accordingly, the court erred in relying upon appellant's failure to appear on the subject charges as an enhancement factor.

The appellant also contends that the trial court incorrectly applied this same enhancement factor by finding the appellant committed these offenses while on misdemeanor probation. T.C.A. § 40-35-114(8). Appellant notes that this Court has rejected the application of T.C.A. § 40-35-114(8) merely because the defendant was

on probation at the time the subject offense was committed. State v. Leon Alcapone Cornes, C.C.A. No. 02C01-9408-CC-00181 (Tenn. Crim. App. filed February 8, 1995, at Jackson). However, the state recognizes that this Court has reached an adverse decision in State v. Keel, 882 S.W.2d 410 (Tenn. Crim. App. 1994).

While it is questionable whether this enhancement factor applies, the deletion of this factor does not necessarily result in a reduction of the sentence. Appellant does not contest the trial court's finding that the appellant was the leader in the commission of these offenses involving one other person. T.C.A. § 40-35-114(2). Accordingly, this is clearly an enhancement factor.

IV

The appellant maintains that the trial court should have reduced his sentence because he has no prior felony convictions and expressed remorse at the sentencing hearing. This Court has previously held that a lack of prior felony convictions is not necessarily a legitimate reason to mitigate a sentence, State v. Keel, 882 S.W.2d at 422 (Tenn. Crim. App. 1994).

Although the appellant expressed words of remorse at the sentencing hearing, the trial court did not consider his testimony as a mitigation for sentencing. "[T]his Court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination is based upon the witnesses' demeanor, appearance, and inflection in their voices." State v. Jernigan, 929 S.W.2d 391, 395 (Tenn. Crim. App. 1996). If the trial court did not consider appellant's alleged remorse sufficient to regard as a mitigation factor, we are reluctant to disturb that finding. Because we find no contrary evidence, we agree with the trial court that appellant's alleged remorse is not a mitigating factor.

V

Our review of the evidence leads us to conclude that the ten (10) year concurrent sentences were appropriate even though the applicability of one enhancement factor is questionable. We affirm the judgments of the trial court.

JOE G. RILEY, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE